IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 517 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BABU BHIKHABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 517 of 1998

MS BANNA S DUTTA for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR KT DAVE, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE M.S.SHAH

Date of decision: 25/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This appeal under Section 374 of the Code of

Criminal Procedure, 1973 is directed against the judgment and order dated 11.5.1998 rendered by the learned Additional Sessions Judge, Amreli in Sessions Case No. 16 of 1994 whereby appellant-accused Babubhai Bhikha Chavda has been convicted for the offences punishable under Sections 302 and 447 IPC and has been sentenced to suffer rigorous imprisonment for life and fine of Rs.1,000/- in default simple imprisonment of six months as far as the offence punishable under Section 302 IPC is concerned and has also been sentenced to suffer imprisonment for one month for the offence punishable under Section 447 IPC. Both the sentences have been ordered to run concurrently.

2. In the above numbered sessions case, the appellant-accused was charged with the offence of criminal trespass in the house of his father-in-law Mavjibhai Badhabhai Parmar, father of his wife Champa on 31.10.1993 at 10.00 in the morning, the offence punishable under Section 498A IPC and also charged with the offence of causing death of his wife Champaben by inflicting knife injuries with the intention and knowledge of causing her death and thereby committing the offence punishable under Section 302 IPC. The accused was also charged with the offence punishable under Section 135 of the Bombay Police Act by violating the notification under the said provision banning deadly weapons being carried in a public place.

3. The prosecution examined PW.1 complainant-Ramjibhai Badhabhai (brother of Mavjibhai and parental uncle of deceased Champaben) and PW 2 minor Kamla Mavjibhai, younger sister of deceased Champa, aged between 10 to 14 years who was not administered oath. These two witnesses were examined as eye witnesses. The other witnesses were panch witnesses, medical witness i.e. the doctor who performed the post-mortem on the dead body of deceased Champa and the Investigating Officer.

Complainant-Ramjibhai reiterated the contents of the complaint (Exh. 7) lodged with the police station at Bagsara in Amreli District on 31.10.1993 at about 12.00 Noon wherein he had stated that Bai Champa was married to the accused about six months prior to the incident. Champa had come to her parents' place at village Nava Vaghnia and her husband i.e. the accused had come to his in-laws' house for taking his wife to his village called Moti Khilori in Gondal taluka of Rajkot District. Kamla, younger sister of the deceased, aged about 14 years, had gone to the house of the complainant shouting that her

elder sister Champa was being beaten up and thereupon the complainant had gone to his brother's place and found that the door of one room was closed from inside and he heard the shouts of Champa. Since the door was closed from inside, another brother of the complainant and the complainant went in the backyard and the other brother had climbed on the roof for opening the country tiles on the roof. In the meantime, the accused came out of the room with a naked blood-stained knife and ran away. On entering the room, the complainant found Champa in a pool of blood as a number of knife blows were inflicted upon her body. Very soon Champa succumbed to the injuries. In the complaint, he had stated that because Champa refused to accompany the accused to his village, the accused had caused the death of Champa. In his cross-examination, the complainant admitted that the accused had come to the house of Mavjibhai (father of Bai Champa) for the last 4-5 days before the incident and was staying there only and that all the persons were staying in the house harmoniously for those 4-5 days and that he had not heard from any family member of Mavjibhai about any ill-treatment to Bai Champa. The complainant further admitted in his cross-examination that he had heard talks about the loose character of Champa. He, of course, denied the suggestion that Champa had illicit relations with Bhura Soma and he also denied the suggestion that Champa's first husband had taken divorce from Champa upon his coming to know about Champa's relations with Bhura Soma.

4. As far as the defence case is concerned, after denying the accusations made against him, in his further statement under Section 313 of the Code of Criminal Procedure, 1973, the accused submitted his written statement dated 18.12.1997 which was given Exh. No. 28. In the said written reply, the accused invoked the exception of grave and sudden provocation and stated that he had gone to the house of his in-laws i.e. parents of his wife Champa with whom he was married only about six months ago, but after the marriage Champa was not behaving properly with him and that she had stayed for a very few days with the accused and thereafter she had gone to her parents' place. Hence, he had gone to the house of Champa's parents and stayed there for 4-5 days requesting her to come back to the matrimonial home, but she was adamant. He further stated in the said reply that Champa had illicit relations with Bhura soma which had also resulted into the divorce of her first marriage, but about which illicit relations the accused had no previous knowledge. Champa, however, was not prepared to return to the matrimonial home with the accused and was

insulting the accused and was also not acceding to the request of the accused for fulfilling her matrimonial obligations. He further stated that in the morning of the date of incident the deceased was quarrelling with the accused and was even taunting the accused that Bhura Soma was superior to the accused even in the matter of physical relationship and, therefore, the accused had lost control over his mind and picked up the knife lying nearby and inflicted knife blows upon Champa. In short, the accused invoked the exception of grave and sudden provocation.

5. After considering the oral and documentary evidence on record, the learned Sessions Judge had no difficulty in holding that the accused had caused the death of Bai Champa. However, the learned Sessions Judge rejected the plea of grave and sudden provocation raised by the accused, by observing - that there was no evidence to support the allegation made by the accused that deceased Champa had illicit relations with Bhura Soma; before the incident Bai Champa had made tea and the mother and sister of the deceased and the accused had tea and the deceased was going back to the kitchen and that, therefore, it cannot be said that there was any occasion for grave and sudden provocation. The learned Sessions Judge acquitted the accused of the offence punishable under Section 498A IPC and the offence punishable under Section 135 of the Bombay Police Act, but the learned Sessions Judge convicted the accused of the offences punishable under Sections 302 and 447 IPC.

Hence, this appeal by the accused against the said order of conviction.

6. At the hearing of this appeal, Ms Banna Dutta, learned counsel for the appellant-accused has made the following submissions :-

(i) The learned Sessions Judge has erred in convicting the accused of the offence punishable under Section 447 IPC when even the complainant had admitted that the accused was staying with his in-laws and his wife Champa for 4-5 days, just prior to the incident, and it had come out even in the evidence of the younger sister of the deceased that Bai Champa had made tea for her mother and sister and for the accused and that all of them had tea before the incident.

(ii) While the accused had caused the culpable homicide of his wife Champa as admitted in his

written statement under Section 313 Cr.PC, the accused had clearly pleaded the defence of grave and sudden provocation right from the beginning. In his cross-examination of the complainant, suggestions were made regarding the loose character of Bai Champa and her illicit relations with Bhura Soma resulting into the dissolution of her first marriage. The complainant, uncle of deceased Champa, had also admitted that he had heard talks about the loose character of Bai Champa.

(iii) The written reply (Exh.. 28) given by the accused explains everything and the manner in which the accused was given grave and sudden provocation. The learned Sessions Judge has erred in requiring the accused to prove his defence beyond reasonable doubt when all that the accused is required to do is to show that his defence is required to be accepted on the touch stone of preponderance of probabilities.

7. On the other hand, Mr KT Dave, learned Additional Public Prosecutor has supported the judgment under appeal.

8. Having heard the learned counsel for the parties, we are clearly of the view that the learned Sessions Judge committed a grave error in convicting the accused for the offence punishable under Section 447 IPC when even the complainant had stated in his FIR (Exh. 7), which was lodged just two hours after the incident, that the accused, husband of Bai Champa, had come to village Vaghnia for the last 4-5 days and was staying at the house of Mavjibhai, brother of the complainant. Even Kamla, younger sister of the deceased stated in her examination-in-chief that the accused had tea alongwith the mother and sister of the deceased as well as the deceased herself. There can be no question of the accused committing any criminal trespass in the house of his father in law Mavjibhai. The only reason given by the learned Sessions Judge is in para 19 of the judgment wherein he has stated that the accused had closed the door from inside being the door of the room where Champa had entered, as the accused wanted to commit the murder of the deceased. It cannot be said that the accused had entered into the house of Mavjibhai with intent to commit an offence or that having lawfully entered into the said house, the accused had unlawfully remained there with intent to commit an offence. Hence, the accused will have to be acquitted of the offence punishable under

Section 447 IPC.

9. Coming to the major offence alleged against the accused i.e. offence punishable under Section 302 IPC, the accused himself admitted in his written statement under Section 313 Cr.PC that he had caused the death of his wife. The accused stated in the said statement at Exh. 28 that the cause of dispute between the deceased and the accused was that the deceased had illicit relations with Bhura Soma who was a partner with the father of the deceased and who was visiting the house of the father of the deceased very frequently. He further stated in the written statement that the previous marriage between the deceased and the first husband had resulted into a divorce on account of the said illicit relations which the deceased had with Bhura Soma, but the accused was not aware of the said relations at the time of his marriage with the deceased. The accused had lost his first wife and the accused had three children. Hence, the accused had married the deceased and was prepared to take his wife Champa back to the matrimonial home if Champa was prepared to give up her relations with Bhura Soma, but the deceased was adamant on continuing her illicit relations with Bhura Soma even though the accused had stayed at his in-laws' place for 4 days before the incident and was pursuading her to return to the matrimonial home. The accused further stated that the deceased was insulting the accused and was also not prepared to have physical relations with the accused. As regards the day on which the incident took place, according to the accused, the deceased had taunted the accused and had stated that Bhura Soma was superior to the accused in physical relationship and, therefore, the accused lost control over his mind and picked up the knife lying in the room without any premeditation.

10. The learned Sessions Judge, however, did not accept the aforesaid plea of grave and sudden provocation on the ground that the accused had not led any evidence to show that deceased Champa had illicit relations with Bhura Soma. The learned Sessions Judge, however, appears to have missed the admission made by the complainant, paternal uncle of the deceased, that he had heard talks about the loose character of Bai Champa and that her first marriage had also resulted into a divorce after just about one year. The complainant stated that he did not know as to why Champa's first marriage had resulted into a divorce and that he had never made any inquiry about the same. It is not possible to believe that in the Indian social set-up, the brother of the father of the divorcee wife would not know the reason for the

divorce. Even the complainant admitted in his cross-examination that after the incident, he had come to know that the first husband of Champa had given her divorce on account of the doubts that he (the first husband) had entertained about Champa's character. The complainant also admitted that the accused has three children from his first marriage. The complainant also admitted that for the 4-5 days prior to the incident, the accused was staying with Champa and her parents. The complainant also admitted that he had not heard about any ill-treatment to Bai Champa at the hands of the accused.

11. In view of the aforesaid evidence of the complainant, who was none other the parental uncle (chacha) of the deceased, it is clear that the accused had legitimate doubt about the character of his wife Champa with whom the accused was annoyed because she was refusing to go back to the matrimonial home. In this set of circumstances and also in the background of the fact that the accused had been staying with the parents of the deceased and her sister for 4-5 days prior to the date of incident, it cannot be said that the accused had gone to the house of his in-laws with any premeditated plan for causing the death of Champa. The accused put suggestions to the witnesses in their cross-examination on the same lines on which the defence was disclosed by him in his further statement under Section 313 Cr.PC. The written statement given by the accused under Section 313 Cr.PC appears to be very frank and truthful and we see no reason to disbelieve the said statement, particularly when for testing the defence of the accused, the Court is not required to adopt the standard of "proof beyond reasonable doubt", but the accused is only required to show that his defence is probable.

12. In view of the above discussion, we are clearly of the view that the accused has proved his plea of grave and sudden provocation as contained in Exception 1 to Section 300 IPC. Accordingly, the conviction of the accused under Section 302 IPC will have to be set aside. The case would fall under Section 304 Part I IPC as the accused had inflicted a number of knife blows on the deceased which were sufficient in the ordinary course of nature to result into death of Champa.

13. Coming to the sentence, we have heard the learned counsel for the parties. Ms Banna Dutta, learned counsel for the appellant-accused has submitted that in view of the plea of grave and sudden provocation being accepted and in view of the fact that the accused has three children from his first marriage and in view of the fact

that the accused has already undergone imprisonment for more than nine years, the accused has suffered sufficient punishment.

14. Having heard the learned counsel on the question of sentence, we are of the view that since the accused was arrested on 27.11.1993 and the accused has remained in custody during trial as well as during pendency of this appeal, the accused has already undergone imprisonment for more than nine years. Hence, the interests of justice will be met if the accused is sentenced to imprisonment already undergone.

15. The following order is accordingly passed :-

The appeal is partly allowed. The conviction of the appellant-accused under Section 447 IPC is set aside. The conviction of the appellant-accused under Section 302 IPC is altered to conviction under Section 304 Part I IPC. The appellant having undergone imprisonment for more than nine years, the appellant is sentenced to the period of imprisonment already undergone. The appellant shall be released forthwith, if not required in connection with any other case or for any other offence.

(B.J. Shethna, J.)

(M.S. Shah, J.)
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